United States Court of Appeals

for the Second Circuit

APPENDIX

74-1952

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1952

JAMES T. LATA

PETITIONER-APPELLANT

V.

UNITED STATES OF AMERICA

RESPONDENT-APPELLEE

APPENDIX OF PETITIONER-APPELLANT

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NEW HAVEN

DISTRICT OF CONNECTICUT

JAMES T. LATA : N 74-109

V. : CIVIL NO. _____

UNITED STATES OF AMERICA :

RULING ON MOTION UNDER 28 U.S.C. § 2255

This is a motion under 28 U.S.C. § 2255, seeking to vacate a sentence imposed upon conviction for armed bank robbery. The conviction was affirmed without opinion. United States v. Lata, 486 F.2d 1397 (2d Cir. 1973). A motion for new trial on the ground of newly-discovered evidence was denied by this Court on March 7, 1974. The current motion raises six issues. The first four are all claims that either were or could have been pursued on direct appeal and cannot be relitigated in this collateral attack. These concern rulings at trial (a) to deny a motion for mistrial because of a newspaper article, (b) to admit into evidence a witness's report of statements of co-conspirators, and (c) to limit to some minor extent the cross-examination of a principal witness; the fourth matter concerns an alleged error in the jury instructions.

The fifth allegation is not properly included in a motion under § 2255, but may be treated as a second motion for a new trial under Fed. R. Crim. P. 33. Petitioner presents, allegedly as newly-discovered evidence, an affidavit

of his convicted co-defendant, Stuart B. Smith, in which Smith avers that Lata is "not guilty." Also submitted is an affidavit from an investigator who obtained the Smith affidavit. These affidavits are sufficient to warrant a hearing to determine whether Smith will present credible evidence that justifies a new trial. That hearing will be scheduled as soon as arrangements can be made to bring both Smith and petitioner to this jurisdiction. Counsel will be appointed to represent petitioner at the hearing.

Petitioner's final point concerns a technical objection to the form of the sentence he received. Separate concurrent sentences were imposed as follows: 20 years on count 1, 10 years on count 2, and 21 years on count 3, the counts concerning 18 U.S.C. §§ 2113(a), (b), and (d), respectively. The effect was to impose a sentence of 21 years, but the preferable form would have been the imposition of a general sentence of 21 years, instead of the specific concurrent sentences on each count. See Gorman v. United States, 456 F.2d 1258 (2d Cir. 1972). While this matter could be corrected at this time, the Court prefers to await the hearing on the motion for a new trial, at which petitioner will be present, so that a corrected sentence can be imposed in his presence. Another reason for deferring action with respect to the sentence is the pendency of a motion under Fed. R. Crim. P. 35 for reduction of sentence, which was timely filed within 120 days of the Court of Appeals affirmance.

That motion will also be deferred until conclusion of the hearing on the motion for new trial.

Accordingly, the first four grounds of the motion under § 2255 are rejected and all relief with respect to that portion of the motion is denied; the remaining allegations will be considered at a hearing to be promptly scheduled. The papers may be filed without fee.

Dated at Hartford, Connecticut, this 3rd day of May, 1974.

Jon O. Newman
United States District Judge

UN STATE ACT COURT

DISTRICT OF CONNECTICUT

JAMES T. LATA :

V. : CIVIL NO. N-74-109

UNITED STATES OF AMERICA :

RULING ON MOTION FOR NEW TRIAL

Petitioner, an inmate of the Federal Penitentiary, Lewisburg, was convicted of armed bank robbery on March 22, 1973, following a lengthy jury trial, and sentenced to twenty-one years in prison. The conviction was affirmed without opinion. United States v. Lata, 486 F.2d 1397 (2d Cir. 1973). A motion for new trial on the ground of newly-discovered evidence was denied by this Court on March 7, 1974. Petitioner then submitted a second motion for new trial,[1/] again alleging the existence of newly-discovered evidence, and a hearing was held on May 20, 1974

The alleged new evidence consists principally of an affidavit from Stuart Smith, petitioner's co-defendant, who was convicted on the same charges and sentenced to fifteen years. Smith states in the affidavit dated December 27, 1973, that Lata "is 'not guilty' and I Stewart B. Smith will testify to same if and when called upon to do so." Petitioner also presented at the hearing an affidavit from Thomas Flood, the private investigator who prepared and took Smith's affidavit, alleging that Smith told him "he knew the name of a person involved but never arrested for the robbery."

Also submitted was a letter written by Smith to Flood, dated March 31, 1974, saying that Lata should not have to "pay for something he didn't do. . . ."

At the hearing, however, Smith refused to answer any questions, invoking his privilege against self-incrimination. Flood testified that Smith had told him on December 27, 1973, at the time of signing the affidavit, that Lata was not involved in the bank robbery. Flood also testified that he had been retained to interview Smith by Linda Ziomek, who had lived with Lata prior to the bank robbery and had been acquitted as a co-defendant.

In the light of Smith's refusal to testify at the May 20 hearing, the mere promise contained in his affidavit to "testify . . . if and when called upon to do so" cannot constitute the basis for granting a new trial. If his testimony is to serve as newly-discovered evidence, it must be evaluated by this Court and must be found to be material and credible, such that, on a new trial, it would probably produce an acquittal, see United States v. Silverman, 430 F.2d 106 (2d Cir. 1970). Smith's refusal to testify at the hearing prevents that evaluation. Moreover, his refusal undermines the claim that any testimony will be forthcoming from Smith if a new trial were ordered. The mere possibility of testimony by Smith cannot justify a new trial. As long as Smith declines to testify, there is no adequate basis for assessing what his testimony at a new trial might be.

The threshold question in evaluating the other evidence presented by petitioner - the Smith affidavit, the

Smi[illegible]cter, the Flood affidavit, and the Flood testimony - is whether any of it would be admissible at a new trial. All of it is hearsay. A new trial is warranted only if, as petitioner contends: (1) an exception to the rule against hearsay evidence exists for declarations against penal interest and (2) this evidence falls within that exception.

Although an exception to the hearsay rule has been expressly denied for declarations against penal interest, as distinct from pecuniary or proprietary interest, Donnelly v. United States, 228 U.S. 243 (1913), that rule has been much criticized and its force greatly eroded in recent years. See Chambers v. Mississippi, 410 U.S. 284, 300 (1973); United States v. Harris, 403 U.S. 573, 583 (1971); United States v. Marquez, 462 F.2d 893, 895 (2d Cir. 1972); United States v. Dovico, 380 F.2d 325, 327 & n. 2 (2d Cir.), cert. denied, 389 U.S. 944 (1967); 5 Wigmore, Evidence, ¶ 1477 at 289-90 (3d ed. 1940); McCormick, Evidence, 549-53 (1954); Model Code of Evidence, rule 509 (1942). The rationale for admitting hearsay declarations against interest applies equally regardless of whether the interest is penal or pecuniary, and the Donnelly rule will be discarded legislatively if the proposed new federal rules of evidence are approved by Congress, see Rules of Evidence for United States Courts and Magistrates, rule 804(b)(4) (1972). Whether judicial abandonment is appropriate need not be decided here. For even if an exception based on penal interest exists, petitioner's

evidence does not fit within the "boundaries," *United States v. Davis*, *supra*, 330 F.2d at 327.[2]

Assuming *arguendo* a broadened penal interest exception, it must be limited to statements "admitting a particular crime for which prosecution is possible at the time," *ibid.* Such statements are deemed trustworthy only if the declarant knows that he is in effect confessing action that would subject him to criminal liability. See *United States* v. *Seyfried*, 435 F.2d 696, 697 (7th Cir. 1970).

Even if petitioner is correct in the contention that Smith could not be prosecuted as an accessory, 18 U.S.C. § 3, for his failure to disclose previously the name of an additional participant in the bank robbery, the risk of such prosecution would be so "remote . . . as to be almost negligible." *United States* v. *Miller*, 277 F.Supp. 200, [illegible] (D. Conn. 1967). It is highly unlikely that Smith anticipated such prosecution or even thought that his previous non-disclosure might be a crime. He was not advised of the possibility by counsel. His decision to invoke the privilege against self-incrimination at the May 20 hearing, following consultation with counsel, is a strong indication that he was unaware of potential criminal liability in making the earlier statements. Smith's statements do not describe conduct commonly understood as criminal in nature. They are not confessions, "unquestionably against interest," *Chambers* v. *Mississippi*, *supra*, 410 U.S. at 301.

Smith's statements lack other "persuasive assurances of trustworthiness," Chambers v. Mississippi, supra, 410 U.S. at 299, considered important by courts that have recognized an exception for such hearsay declarations. The statements were made long after the crime, not immediately following it; they were made in a well-planned interview, not spontaneously, id., at 300; United States v. Walling, 486 F.2d 229, 239 (9th Cir. 1973). They are corroborated by little, if any, other evidence, Chambers v. Mississippi, supra, 310 U.S. at 302; United States v. Walling, supra, 486 F.2d at 239.[3/] Aside from the letter, they were made on a single occasion, during the December 27 interview with Flood; and all, including the letter, were made to a single individual, a private investigator retained by a close associate of petitioner. For all of these reasons, the Smith statements, both written and as reported by Flood, do not qualify as declarations as penal interest. Since they are not admissible as evidence, they cannot justify a new trial.

Even if these statements were within the penal interest exception, they would be admissible only in part. The exception would apply solely to those portions of the Smith statements that are against his penal interest, see United States v. Marquez, supra, 462 F.2d at 895, and the remainder would be excluded. The parts of his declarations that assert Lata's innocence would therefore be of doubtful admissibility. His declaration that petitioner is "not

guilty" does not make him liable to prosecution as an accessory. Only his statement that he knows of a third individual's involvement is arguably against his penal interest. Taken alone, that evidence will not justify a new trial. It would not probably produce an acquittal; a third person's involvement in some capacity would not prove petitioner's innocence of the charges on which he was convicted.

As for petitioner's claim that exclusion of the Smith statements would violate his constitutional right to due process of law, the circumstances of this case are clearly distinguishable from those in Chambers, the case on which he principally relies. The holding in Chambers was a narrow one, expressly limited to its particular "facts and circumstances," Chambers v. Mississippi, supra, 310 U.S. at 301. The declarations there were made spontaneously, to a close acquaintance shortly after the murder occurred; they were corroborated by independent evidence, as well as by their "sheer number" and each was a confession "in a very real sense self-incriminatory and unquestionably against interest," id., at 300-01.

The exclusion of the statements offered by the Chambers defendant was not the sole basis for reversal of the conviction in that case; rather, it was "the exclusion of this critical evidence coupled with the State's refusal to permit Chambers to cross-examine McDonald," a witness who

had given damaging testimony against him, that "denied him a trial in accord with traditional and fundamental standards of due process," id., at 302 (emphasis added).

Accordingly, petitioner's motion for a new trial is denied.

Dated at New Haven, Connecticut, this 25 day of June, 1974.

Jon O. Newman

Jon O. Newman
United States District Judge

FOOTNOTES

1/ Although it was initially included in a motion under 28 U.S.C. § 2255, it was treated as a motion for a new trial under Fed. R. Crim. P. 33. See Lata v. United States, Civil No. 74-109 (D. Conn. May 6, 1974). Five other issues were also raised by the § 2255 motion. Four were rejected in the first opinion, id.; the fifth was dealt with in open court during the May 20 hearing.

2/ The Court assumes, arguendo, that Smith's invoking the privilege renders him "unavailable" for purposes of assessing the admissibility of these hearsay declarations. See Rules of Evidence for United States Courts and Magistrates, rule 804(a)(1) (1972). Unavailability of Smith, as a result of his refusal to answer (or for any other reason), would be a precondition to applying the penal interest exception, as it would be to the admissibility of any declaration against interest.

3/ The corroboration requirement is specifically adopted in the proposed rules establishing the penal interest exception, see Rules of Evidence for United States Courts and Magistrates, supra, rule 804(b)(4). Moreover, as approved by the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, there would be a requirement of "corroborating circumstances" not merely corroborating statements.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JAMES T. LATA	:	
PETITIONER-APPELLANT	:	
V.	:	DOCKET NO. 74-1952
UNITED STATES OF AMERICA		
RESPONDENT-APPELLEE	:	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the brief and appendix for petitioner appellant was mailed, postage pre-paid, this 20th day of September, 1974 to Peter Clark, Esq., Assistant United States Attorney, Post Office Building, New Haven, Ct. and James T. Lata, P.O. Box 1000, Lewisburg, Pa.

Thomas D. Clifford

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